81873-8

NO. 59211-4-I

SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA LAKE, individually,

Respondent,

v.

WOODCREEK HOMEOWNERS ASSOCIATION, a Washington homeowners association; GLEN R. CLAUSING, a single man,

Petitioners.

PETITION FOR REVIEW OF WOODCREEK HOMEOWNERS ASSOCIATION

JOHNSON ANDREWS & SKINNER, P.S.
Scott M. Barbara, WSBA# 20885
Attorneys for Petitioner Woodcreek Homeowners Association

200 West Thomas, Ste 500
Seattle, WA 98119
206-223-9248

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A. IDENTITY OF PETITIONER

Woodcreek Homeowners Association (hereinafter "Woodcreek") asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

On December 31, 2007 the Court of Appeals, Division I, filed a decision reversing the King County Superior Court's order that granted summary judgment in favor of defendants Clausing and Woodcreek. A copy of the Court of Appeals decision is in the Appendix at pages A-1 through A-11.

On May 22, 2008 the Court of Appeals filed an Order Denying Motion for Reconsideration. A copy of the order denying defendant Clausing's motion for reconsideration is in the Appendix at page A-12.

C. ISSUES PRESENTED FOR REVIEW

Under the Horizontal Property Regimes Act, RCW 64.32, is unanimous consent of all owners required to combine an apartment with a common area when the declared values set forth in the condominium declaration are unchanged following the combination and the combination is approved by at least the minimum vote of the owners required by the terms of the declaration and the Act?

D. STATEMENT OF THE CASE

Plaintiff Sandra Lake (hereinafter "Lake") and defendant Glen Clausing (hereinafter "Clausing") are homeowners of adjacent units, separated by a greenbelt, at Woodcreek Condominiums. A picture of their respective units appears in the record before the Court. (CP 109). This case arises from Lake's challenge to the propriety of Woodcreek's approval of and Clausing's construction of a bonus room over his garage.

1. Undisputed Facts

Woodcreek was created in 1972 under the Horizontal Property Regimes Act, RCW 64.32. (CP 218-266) It consists of 150 townhouses built on approximately 23 acres of land and built in 3 phases. In each phase, there were floor plans that included an optional "bonus room." (CP 221-22; 342-43; 385-86). The optional bonus room was typically available to only certain floor plans within each phase; however, in phase 3, where Lake's and Clausing's units are located, the bonus rooms were available to all floor plans. (CP 395; 376).

In May of 2004 Clausing applied to the Woodcreek Homeowners Association Board for permission to construct the optional bonus room over the garage of his unit, Unit 109, (CP 159-60). The Woodcreek By-Laws, article V, section 2(f), require owners to get written approval from the Board of Directors before undertaking any structural modifications of

a unit, common area or limited common area. (CP 415-6). The Board considered and approved Clausing's request to add the bonus room, (CP 161), as it had considered and approved bonus rooms on several other occasions, starting as early as 1978. (*See, e.g.,* CP 182-83; 179; 144; 139). In June of 2006, at the Woodcreek Homeowners Association's Annual Meeting, the homeowners ratified and approved all prior actions of the Board in approving owner-constructed bonus rooms by an affirmative vote of 95.79% of votes cast (91/95) and 60.67% of all possible votes (91/150). (CP 137). In conjunction with the approval and construction of Clausing's bonus room, the Woodcreek Homeowners Association was never asked to, and never did, approve an amendment to the Woodcreek Declaration that altered the value of the property, the units or the percentage of the undivided interest of each apartment owner in the common areas.

(a) The 1972 Condominium Declaration

In 1972 the Declarant filed the original Condominium Declaration for Woodcreek Division No. 1. (CP 218-66). Section 8 of the Declaration established the value of the property and the value and undivided interest of the 50 units that were to comprise Division No. 1. (CP 228-9). Annex A to the Declaration set forth a particular description for each unit. (CP 243-60) An analysis of several units in Division 1 reveals the Declarant did not use square footage to determine either value or undivided interest (the ratio of

the unit value to the total value) given the price per square foot varies both with unit and lot square footage. (CP 711).

Annex B to the original Declaration set forth the value of the property, the value of each unit and the percentage of undivided interest for Woodcreek upon the prospective addition of Phases 2 and 3. (CP 261-6).

Section 3 of the Declaration, (CP 221-2), set forth the four unit plans for Division No. 1 and indicated there were four alternate floor plans for a bonus room that could be added to two of the unit plans "[u]pon the option of the purchaser..." (CP 222). "The second floor plans for the Type C and D Units will include an additional area to be situated directly above the two car garage which is incorporated within the basic structure of the apartment unit." (CP 222). Nowhere in the Declaration is there any indication that the addition of a bonus room as a purchaser option would alter the value of the property, the value of a unit, or the undivided percentage of ownership.

Section 12 of the Woodcreek Declaration, (CP 232-3), sets forth the procedures for subdividing and/or combining "any apartment unit or units or [ ] the common areas or facilities or limited common areas or facilities." (CP 232). Specifically, section 12 requires an "affirmative vote of 51% of the voting power of the owners of the apartment units." (CP 232). While section 12 does set forth how the subdivision of an apartment unit affects the percentage of undivided ownership, it does not dictate any effect on the

percentage of undivided ownership resulting from a combination of a unit or units with common or limited common areas and facilities.

Section 19 of the Declaration, (CP 240), allows the declaration to be amended upon 60% written consent of the apartment owners. It further provides that "an amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous written consent of all apartment owners..." (CP 240). The only amendments to the Woodcreek Declaration that have involved the value of the property and units and the undivided percentage of ownership are those that were made by the Declarant.

(b) The 1973 Amendment to the Declaration

In 1973 the Woodcreek Declaration was amended, (CP 275-324), with changes being made to the value of the property, the value of each unit and the percentage of undivided interest, (CP 285-6); however, sections 3, 12 and 19 were unchanged. (CP 278-9, 289-90, 298). Annex B to the Amended Declaration again set forth what effect the addition of phases 2 and 3 would have on Woodcreek, if added. (CP 319-24). The Declarant was still not using square footage as the basis for determining value. (CP 713).

(c) The 1974 Amendment to the Declaration (Adding Phase 2)

In 1974 the Woodcreek Declaration was again amended; this time to incorporate Division No. 2. (CP 341-63). Sections 3 and 4 of the 1974

amendment provided for the addition of 11 buildings, consisting of 50 units, and 3 unit types. (CP 342-3). Two of the unit types had an optional bonus room that would be "situated directly above the two car garage, which is incorporated within the basic structure of the apartment unit." (CP 343) Sections 12 and 19 of the 1972 Declaration, as amended, were not changed.

Annex A to the 1974 amendment established the description of the units in Division No. 2, (CP 347-59), and Annex B to the 1974 amendment established the value of the property and units and the percentage of undivided interest. (CP 360-3) The values of the units in Division No. 1 were unchanged; however, their respective percentages of undivided interest proportionately declined. In contrast to the 1972 Declaration and the 1973 amendment, the 1974 amendment, in Annex B, declined to provide the units values and percentages of undivided interest for any potential Division No. 3. Instead, it established the declared value of the property, should Division No. 3 be added, and confirmed that the percentage of undivided interest of units in Division No. 1 and No. 2 would be established by the ratio of the individual unit value to the total property value. (CP 362-3). Analysis reveals no correlation square footage and value. (CP 714).

(d) The 1976 Amendment to the Declaration (Adding Phase 3)

The Woodcreek Declaration was amended again in 1976 to add the last 50 units, spread over 12 buildings, and consisting of 4 unit types. (CP

383-93). Section 4 of the 1976 amendment specified that 2 of the 4 unit types could incorporate a bonus room at the option of the purchaser. (CP 385-6). Both Lake and Clausing own units Phase 3, with declared values and percentages of undivided ownership set forth therein. (CP 393).

The 1976 amendment did not affect the provisions of the Declaration dealing with the procedures for amending the declaration or subdividing and/or combining units and/or common or limited common areas. The 1976 amendment carried forward the values of the units from Division No. 1 and No. 2 such that there could still be no correlation between the declared value of the individual units and the square footage of either the units or the lots upon which they sat. The Annex to the 1976 Amendment set forth the declared value of the total property, each unit, and the percentage of undivided ownership of each unit. (CP 391-3).

(e) The 1977 Amendment to the Declaration

When Division No. 3 was added to Woodcreek by the 1976 Amendment to the Declaration, only 2 of the 4 units types, Type L and Type M, were designated as having the option of a bonus room. (CP 385-6). In 1977 Woodcreek filed a Certificate of Amendment that designated all 4 unit types in Division 3 as potentially having a bonus room, and confirmed that bonus rooms had been constructed as part of all 4 types:

In addition on Page 5 of 5 of the Survey Map and Plans there is designated in the plans for Type J, K, L and M units, a room designated as the Bonus Room. The following Units have been constructed with Bonus Rooms, which consists of 416 additional square feet:

130M
131M
137K
139J
146L
149M

(CP 395). The 1977 Amended Survey Map and Plans further sets forth that bonus rooms were also constructed in a number of other units of all 4 unit types. (CP 372-6). Significantly, the identification of bonus rooms in all 4 unit types did not alter the value of the property, the individual units or the percentage of undivided ownership of those units as set forth the Declaration as last amended in 1976.

A comparison of the percentage ownership of the 6 units identified in the 1977 amendment to other similar units in Division No. 3, including Lake's unit, establishes the lack of correlation between bonus rooms, unit values and percentage of undivided interest among unit. (CP 716-7).

Unit	Type	Bonus Room	Value	% Interest
107	J	N	$41,289	.584
135	J	N	$44,189	.626
139	J	Y	$41,289	.584
112	K	N	$46,364	.656
132	K	N	$46,364	.656
137	K	Y	$46,364	.656
102	L	N	$49,989	.708

Unit	Type	Bonus Room	Value	% Interest
108 (Lake)	L	Y	$56,786	.801
121	L	N	$51,076	.723
146	L	Y	$49,989	.708
129	M	N	$51,076	.723
130	M	Y	$41,289	.584
131	M	Y	$44,189	.626
133	M	N	$42,376	.600
144	M	N	$45,276	.641
149	M	Y	$44,189	.626

2. Procedural History of this Case.

On December 5, 2005 Lake filed suit against Woodcreek and Clausing. (CP 1-10). On May 4, 2006 attorney Kris Mr. Sundberg filed an Answer on behalf of Woodcreek, including a crossclaim against Clausing. (CP 13-23). On June 21, 2006 Clausing answered Lake's Complaint, including a counterclaim against Lake and a crossclaim against Woodcreek. (CP 24-31).

During summer 2006 attorney Sundberg withdrew and attorney Marion Morgenstern substituted as counsel for Woodcreek. (CP 32-33).

On September 13, 2006 Lake filed a motion for partial summary judgment, noting it for hearing on October 11, 2006. (CP 46-52). On September 27, 2006 attorney Morgenstern and counsel undersigned filed their Notice of Withdrawal and Substitution of Counsel for Woodcreek. (CP 86-87)

On October 8, 2006 Clausing filed his response to Lake's motion for partial summary judgment and cross-moved.[1] (CP 101-23). On October 25, 2006 Woodcreek joined in Clausing's motion for summary judgment and dismissal of Lake's claims and Complaint. (CP 664-5).

On November 1, 2006 Woodcreek filed a motion for leave to amend its Answer. (CP 617-37) Lake opposed the motion, (CP 638-49); however, on November 16, 2006, the trial court granted the motion, noting there was ample time to complete discovery and leave was being freely given in the absence of prejudice to the other parties, and imposed $1,000 in terms. (CP 720-22).

The King County Superior Court granted summary judgment and dismissal in favor of Woodcreek and Clausing on November 22, 2006, (CP 777-81); and Lake appealed on November 27, 2006. (CP 782-91).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Woodcreek Homeowners Association respectfully submits the Court should accept review for two reasons. First, the opinion of Division I of the Court of Appeals in this case is in conflict with the opinion of Division III of the Court of Appeals in *McLendon v. Snowblaze Rec. Club Owners Assoc.*, 84 Wn.App. 629, 929 P.2d 1140 (1997). Second, there are tens of thousands of condominium units in the State of Washington that

[1] At Woodcreek's request, the trial court continued the hearing on Lake's motion for summary judgment from October 11, 2006 to November 22, 2006. (CP 820-21).

are governed by the Horizontal Property Regimes Act. Having correct and consistent interpretations of the provisions of the Horizontal Property Regimes Act is a matter of substantial public interest to the individual owners of the units in those condominiums and is invaluable to the boards and managers who are charged with operating those condominiums in compliance with that Act, their source documents and by-laws.

1. Divisions I and III of the Court of Appeals are in Conflict Regarding the Interpretation of the Horizontal Property Regimes Act.

More than a decade before Division I of the Court of Appeals decided this case, Division III was confronted with essentially the same issue in *McLendon v. Snowblaze Rec. Club Owners Assoc.*, 84 Wn.App. 629, 929 P.2d 1140 (1997). In *McLendon* a condominium owner sued the association for leasing a common storage area that was adjacent to another owner's unit for conversion into a bedroom. The Snowblaze board's approval of the lease was subsequently approved by a vote of the owners that was greater than 63% in favor.

RCW 64.32.090(10) mandates each declaration contain:

> A provision authorizing and establishing procedures for the subdividing and/or combining of any apartment or apartments, common areas and facilities or limited common areas and facilities, which procedures must provide for the accomplishment thereof through means of a metes and bounds description;

The Snowblaze declaration did so provide:

> "[A]partment owners having sixty percent (60%) of the votes may provide for the subdivision of [sic] combination or both, of any apartment or apartments or of the common areas, or any parts therof [sic], and the means for accomplishing such subdivision or combination, or both...." Section 16.01 of the 1987 Declaration.

McLendon, 84 Wn.App. at 632. The *McLendon* court concluded the 63.45% vote of the owners satisfied the declaration's requirement for 60% of the votes to allow combination and ratified the lease. *Id.*

The *McLendon* court then went on to reject the very position argued by Lake and advanced by Division I of the Court of Appeals in this case:

> Mr. McLendon argues that section 30 of the 1987 Declaration requires unanimous approval to combine the apartment and common area. He is mistaken. That provision, or at least the portions addressed by the parties here, controls amendment of the entire declaration. It does not address the question before us: voting requirements for combining a common area and an apartment.

Id., 84 Wn.App. 632-3.

While Division I of the Court of Appeals is correct in noting, "The [*McLendon*] court's opinion does not quote the portion of the declaration relied upon by McLendon," it was not necessary to do so as the Horizontal Property Regimes Act dictates the relevant provision of the declaration for each condominium organized under the Act:

The declaration shall contain the following:

* * * *

> (13) The method by which the declaration may be amended, consistent with this chapter: PROVIDED, That *not less than sixty percent of the apartment owners shall consent to any amendment except that any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous consent of the apartment owners.* [Emphasis added].

RCW 64.32.090(13).

For over a decade, under the *McLendon* decision, condominiums throughout the State that had been organized under the Horizontal Property Regimes Act were able to approve the subdividing and combining of apartments and common areas with such a vote as their declarations might require. Those condominiums that happen to be geographically located within Division III of the Court of Appeals are still free to do so; however, following the decision of Division I in this case, those condominiums organized under the Horizontal Property Regimes Act that are geographically located within Division I are not. Condominiums organized under the Horizontal Property Regimes Act that happen to be geographically located within Division II act at their peril given that Division I and Division III disagree.

The *McLendon* court readily reconciled the provisions of RCW 64.32.050(3) and 64.32.090(10) by concluding the provisions meant

exactly what they said. RCW 64.32.050(3) prohibits actions for partition or division of the common areas and facilities. RCW 64.32.090(10) requires declaration provisions allowing for combination and/or subdivision of apartments, common areas and limited common areas. *McLendon*, 84 Wn.App. at 633.

"Partition" involves the division of real property that is held jointly or in common into individually owned interests. *Schultheis v. Schultheis*, 36 Wn.App. 588, 589, 675 P.2d 634 (1984); Black's Law Dictionary (8th ed. 2004). As noted by the *McLendon* court, allowing partition of the common areas "would disrupt the whole condominium structure." 84 Wn.App. at 633. As such, the Horizontal Property Regimes Act specifically prohibited an action for partition of the common areas unless the property at issue had been removed from the provisions of the Act. RCW 64.32.050(3). When RCW 64.32.050(3) is read to mean what it says, then there is no conflict with RCW 64.32.090(10)'s requirement for a provision regarding combining and/or subdividing of apartments, common areas or limited common areas as there is no partition.

In arriving at its decision in this case, Division I ignored the rules of statutory construction.

> The initial principle of statutory interpretation is we do not construe unambiguous statutes: "In judicial interpretation of statutes, the first rule is 'the court should assume that the

> legislature means exactly what it says. Plain words do not require construction'." [Citations omitted].

Davis v. Dept. of Licensing, 137 Wn.2d 957, 963-4, 977 P.2d 554 (1999).

Implicit in the majority decision and expressly stated in the concurring opinion is a rejection of the plain language of RCW 64.32.090(13) and section 19 of the Woodcreek declaration. (CP 240). The statute and the declaration state "any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous" consent of the owners. It follows from the plain language of the statute and section 19 that an amendment that does not so alter the value of the property and of each apartment and the percentage of the undivided interest in the common areas need not have unanimous consent.

The "value" referenced in the statute and section 19 of the Woodcreek Declaration is declared value that is set out in the declaration itself. The property, apartments and common areas have no other "value" that could be changed but for declared values. As already established, the Declarant at Woodcreek did not establish any formula for arriving at the declared values; consequently, it does not follow that the addition of a bonus room to Clausing's unit affects the value of the property, each unit and the percentage of undivided interest in the common areas.

This feature of the Woodcreek source documents is in sharp contrast to the source documents for the condominiums in *Bogomolov v. Lake Villas Condominium Association*, 131 Wn.App. 353, 127 P.3d 762 (Div. 1, 2006). In that case, the value of each unit was a combination of values: the unit's declared value plus the declared value of assigned parking spaces plus the declared value of assigned docks. By creating additional docks on the common area and assigning them, via lease, to individuals units, the Lake Villa Condominium Association did change the value of its property, each apartment and the undivided interests in the common areas.

A further critical distinction between the Lake Villa Condominiums' source document and Woodcreek's is that section 27 of the declaration for Lake Villa Condominiums required unanimous consent on all owners to affect any subdivision or combining vice the 60% required by section 19 of the Woodcreek Declaration. (CP 746).

In arriving at its decision, Division I also ignored the statutory construction precept that the court is not to add language to the statute.

> Further, a court must not add words where the legislature has chosen not to include them. A court also must construe statutes such that all of the language is given effect, and "'no portion [is] rendered meaningless or superfluous.'" *Id.* (quoting *Davis v. Dep't of Licensing,* 137 Wash.2d 957, 963, 977 P.2d 554 (1999)).

Restaurant Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

In order to arrive at its decision, the majority and concurring opinions require that RCW 64.32.090(10) and section 12 of the Woodcreek Declaration be read to include a requirement that only like-kinds of properties may be combined or subdivided. Neither the statute, nor the declaration, speaks of like-kind properties being combined or subdivided. Indeed, adding such wordage to the statute and declaration renders part of the provisions superfluous. The common areas and facilities are already held in an undivided state by all owners at Woodcreek. Woodcreek can conceive of no circumstance under which it would be necessary to combine common area with common area or subdivide common area into common areas.

Woodcreek Condominium Association respectfully submits the conflict between Division I and Division III of the Court of appeals regarding the interpretation of the Horizontal Property Regimes Act is irreconcilable without the intervention of this Court.

2. Correct Interpretation of the Horizontal Property Regimes Act is of Substantial Public Interest to the Thousands of Condominium Owners Governed by that Act.

Woodcreek has been unable to find a reliable source for the total number of condominiums in the State of Washington that are organized

under the Horizontal Property Regimes Act; however, between 1963, when the Horizontal Property Regimes Act was passed, and 1996, nearly 70,000 units were recorded in the five county Puget Sound Region alone, with more than half having been organized before the passage of the Condominium Act, RCW 64.34. Fahey, Tim, "Seattle Area Condominium Market Subdued," *The Seattle Daily Journal of Commerce*, 23 Feb. 1996: Commercial Marketplace (a copy is in the Appendix, pages A-21 to A-25, and is available online). These numbers does not account for condominiums created elsewhere in the State between 1963 and the passage of the Condominium Act.

What is clear is that tens of thousands of condominium units that were organized under the Horizontal Property Regimes Act are still governed by that Act as only a limited number of provisions of the Condominium Act apply to condominiums created prior to July 1, 1990. RCW 64.34.010. The owners of all of these units have an interest in the interpretation of the provisions of the Horizontal Property Regimes Act as it directly affects them and their property. Further, the boards of directors and managers/managing agents of the various condominiums operating under the Horizontal Property Regimes Act have an interest in the interpretation of the Act is it directly impacts what and how that may carry out the business of their condominiums.

It has been approximately 45 years since the first condominiums organized under the Horizontal Property Regimes Act came into being. In that time, there have been changes to building and fire codes, technological advancements such as cable and satellite television, and residential wiring for networks. Skylights, solar cans and solar panels have become popular, if not commonplace. Further, there have been statutory changes that create requirements that may be incompatible with the interpretation of the Horizontal property Regimes Act as interpreted by Division I of the Court of Appeals.

In contrast to the scenario posited in the concurring opinion of "a prized common area garden" being eliminated by an addition that received less than unanimous consent, one can envision a disabled individual needing to construct a ramp to their unit over common area and making a claim against their condominium association under either Washington's Law Against Discrimination or the Americans with Disabilities Act when the vote of a single owner rejecting the intrusion on their undivided interest in the common areas destroys unanimous consent and exposes the entire association to liability.

Woodcreek Condominium Association respectfully submits there is substantial public interest in having this Court ensure there is a correct

and uniform interpretation of the Horizontal Property Regimes Act throughout the State of Washington.

F. CONCLUSION

The Court should accept review of the issue raised in this petition in order to resolve the conflict of authority between Divisions I and III of the Court of Appeals regarding the combination of apartments, common areas and limited common areas under the Horizontal Property Regimes Act and address an issue of public interest to all of the condominiums created under the Horizontal Property Regimes Act. Woodcreek Homeowners Association prays this Court accepts review, reverses the decision of Division I of the Court of Appeals in this case, and reinstates the Order of the King County Superior Court granting summary judgment and dismissal of Ms. Lake's claims and Complaint, in their entirety, with prejudice.

RESPECTFULLY SUBMITTED this 19th day of June, 2008.

JOHNSON ANDREWS & SKINNER, P.S.

By: _____
SCOTT M. BARBARA, WSBA# 20885
Attorneys for Petitioner Woodcreek
Homeowners Association

APPENDIX

CLake v. Woodcreek Homeowners Ass'n
Wash.App. Div. 1,2007.

Court of Appeals of Washington,Division 1.
Sandra LAKE, individually, Appellant,
v.
WOODCREEK HOMEOWNERS ASSOCIATION, a Washington homeowners association; Glen R. Clausing, a single man, Respondents.
No. 59211-4-I.

Dec. 31, 2007.

Background: Objecting condominium unit owner brought action for specific performance of condominium building restriction against another owner and owners' association after new room was added to another unit. The Superior Court, King County, Douglass A. North, J., granted defendants summary judgment. Objecting owner appealed.

Holdings: The Court of Appeals, Ellington, J., held that:
(1) added room required approval of all owners, and
(2) suit was not barred by laches.

Reversed and remanded.

Appelwick, C.J., filed concurring opinion.

West Headnotes

[1] Condominium 89A 1

89A Condominium
89Ak1 k. In General; Nature of Condominium. Most Cited Cases
All condominiums are statutorily created. West's RCWA 64.32.250.

[2] Condominium 89A 1

89A Condominium
89Ak1 k. In General; Nature of Condominium. Most Cited Cases

Condominium 89A 13

89A Condominium
89Ak13 k. Individual Units; Use and Control. Most Cited Cases
The rights and duties of condominium unit owners are not the same as those of real property owners at common law, and are instead determined by the governing statutes, the condominium declaration, and the bylaws of the condominium association. West's RCWA 64.32.250.

[3] Condominium 89A 13

89A Condominium
89Ak13 k. Individual Units; Use and Control. Most Cited Cases
(Formerly 89Ak1)
In exchange for the benefits of association with other owners, condominium purchasers give up a certain degree of freedom of choice which they might otherwise enjoy in separate, privately owned property. West's RCWA 64.32.250.

[4] Condominium 89A 6.1

89A Condominium
89Ak6 Common Elements; Management and Control
89Ak6.1 k. In General. Most Cited Cases
Air space above an apartment unit is shared "common area" within meaning of condominium declaration stating that "all areas not expressly described as part of the individual residence

apartments or as limited common area" are common areas, since it is not part of the apartment and is not limited common area. West's RCWA 64.32.080.

[5] Condominium 89A 11

89A Condominium
89Ak6 Common Elements; Management and Control
89Ak11 k. Improvements and Alterations. Most Cited Cases
Condominium unit owner's construction of "bonus room" above his garage altered percentage of undivided interest in common areas, which, under condominium declaration, required unanimous consent of all owners; bonus room converted common area in form of air space into apartment area and created new common area, altering allocation of common expenses. West's RCWA 64.32.080.

[6] Condominium 89A 13

89A Condominium
89Ak13 k. Individual Units; Use and Control. Most Cited Cases
Past practice of condominium board in approving unit owners' construction of additional rooms, altering percentage of undivided interest in common areas, without unanimous approval of all owners did not enlarge board authority to continue to do so. West's RCWA 64.32.010.

[7] Condominium 89A 11

89A Condominium
89Ak6 Common Elements; Management and Control
89Ak11 k. Improvements and Alterations. Most Cited Cases

Condominium 89A 13

89A Condominium
89Ak13 k. Individual Units; Use and Control. Most Cited Cases
Section of condominium declaration providing that "no subdivision or combination of any apartment unit or units or of the common areas or facilities or limited common areas or facilities may be accomplished except by authorization by the affirmative vote of 51% of the voting power of the owners" allowed only combining or subdividing areas of like quality, such as apartments and apartments, and not areas of different ownership quality, such as common areas and apartments, since combining or subdividing areas of different quality would have changed total amount of common area in which all owners had interest. West's RCWA 64.32.090(10).

[8] Equity 150 67

150 Equity
150II Laches and Stale Demands
150k67 k. Nature and Elements in General. Most Cited Cases
"Laches" is an implied waiver arising from knowledge of existing conditions and acquiescence in them.

[9] Equity 150 70

150 Equity
150II Laches and Stale Demands
150k68 Grounds and Essentials of Bar
150k70 k. Knowledge of Facts. Most Cited Cases

Equity 150 72(1)

150 Equity
150II Laches and Stale Demands
150k68 Grounds and Essentials of Bar

150k72 Prejudice from Delay in General
150k72(1) k. In General. Most Cited Cases
To establish laches, the defendant must show the plaintiff (1) knew or reasonably should have known the facts constituting the cause of action, (2) unreasonably delayed commencing the action, and (3) caused resulting damage to the defendant.

[10] Specific Performance 358 ⚿105(3)

358 Specific Performance
358IV Proceedings and Relief
358k105 Time to Sue, Limitations, and Laches
358k105(3) k. Laches. Most Cited Cases
A reasonable delay in filing suit is not fatal to an action for specific performance of a building restriction where the delay results from a desire to procure compliance by means other than litigation.

[11] Judgment 228 ⚿181(6)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(5) Matters Affecting Right to Judgment
228k181(6) k. Existence of Defense. Most Cited Cases
Fact question as to whether objecting condominium unit owner's failure to seek restraining order to prevent construction of addition to another unit during seven-week construction period was unreasonable, as required to establish laches, precluded summary judgment in her suit for specific performance of building restriction.

****1225** Marianne Kathryn Jones, Attorney at Law, Mona Kathleen McPhee, Jones Law Group PLLC, Bellevue, WA, Christopher Ian Brain, Tousley Brain Stephens PLLC, Seattle, WA, for Appellant.
Scott Michael Barbara, Johnson Andrews & Skinner PS, Seattle, WA, Charles Edward Watts, Attorney at Law, Bellevue, WA, for Respondents.
ELLINGTON, J.
***359** ¶ 1 With permission of the condominium board of directors, a unit owner built a second story "bonus room" above his garage. This both converted common area (air space) into apartment area, and created new common area (e.g., walls), thus changing the character of the property and altering all of the owners' undivided percentage interests in the common areas. Under the condominium declaration, such a change requires unanimous consent of all owners, which was not obtained. The board's authorization of the bonus room was therefore improper. We reverse the superior court and remand for further proceedings.

BACKGROUND

¶ 2 Glen Clausing and Sandra Lake own townhomes in Woodcreek Condominiums in Bellevue. When the development was built in 1972 through 1977, the developer offered an option with certain types of units for a bonus room-an extra room above the garage.[FN1] Some purchasers opted for bonus ****1226** rooms at the time of construction. As required by law, at the end of construction, the developer declared the value of each unit and the total value of the development. The ratio of each unit's value to the total determined each owner's undivided percentage interest in the common

areas.

> FN1. The original declaration provided: "[T]here is designated in the plans for Type C and D units a room designated as the 'Bonus Room.' Upon the option of the purchaser, the second floor plans for the Type C and D Units will include an additional area to be situated directly above the two car garage which is incorporated within the basic structure of the apartment unit. The Bonus Room will consist of one of four alternate floor plans. The Bonus Room will increase the square footage of said units by 415 square feet." Clerk's Papers at 222. The declaration included this language each time it was amended to reflect a new phase of construction.

¶ 3 Clausing's unit is one of those for which a bonus room was originally an option. In mid-May 2004, Clausing obtained approval from the board of directors of the Woodcreek Homeowners Association to build a bonus room. When construction began, Lake, who lives across from Clausing, realized the new room would affect her natural light and block part of her territorial view. She complained ***360** immediately to two board members and at the next board meeting a few days later, she formally objected. The board refused to withdraw its approval. Within four weeks, the bonus room's siding was up and the roof was complete.

¶ 4 Lake consulted her attorney, who wrote to the board on August 26 contending the board's action was unauthorized and seeking withdrawal of the board's approval and removal of the new room. The board again refused.

¶ 5 As of September 1, the board increased Clausing's dues to cover the common expenses associated with the new structure.

¶ 6 In December 2005, Lake filed this action against the Woodcreek Homeowners Association and Clausing. She moved for partial summary judgment, arguing that approval and construction of a bonus room violated the Horizontal Property Regimes Act, chapter 64.32 RCW, and the condominium declaration. Clausing and Woodcreek also moved for summary judgment, contending the Board's action was proper. The trial court agreed with Clausing and Woodcreek, awarded fees and costs against Lake, and dismissed. Lake appeals.

ANALYSIS

¶ 7 The usual standard for summary judgment applies.[FN2]

> FN2. We review a grant of summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. *Overton v. Consol. Ins. Co.,* 145 Wash.2d 417, 429, 38 P.3d 322 (2002). Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c).

[1][2][3] ¶ 8 "All condominiums are statutorily created." [FN3] The rights and

duties of condominium unit owners are not the same as those of real property owners at common law, and are instead determined by the governing statutes, the condominium declaration, and the bylaws of the condominium*361 association.[FN4] In exchange for the benefits of association with other owners, condominium purchasers " 'give up a certain degree of freedom of choice which [they] might otherwise enjoy in separate, privately owned property.' " [FN5] The Horizontal Property Regimes Act, Washington's first law authorizing condominiums, governs the Woodcreek development.[FN6] All owners are subject to the condominium's declaration and bylaws.[FN7]

FN3. *Shorewood West Condo. Ass'n v. Sadri,* 140 Wash.2d 47, 52, 992 P.2d 1008(2000).

FN4. *Id.*

FN5. *Id.* (quoting *Noble v. Murphy,* 34 Mass.App.Ct. 452, 456, 612 N.E.2d 266 (1993)).

FN6. *Id.*

FN7. RCW 64.32.250.

¶ 9 The Woodcreek declaration provides that any alteration in the percentage of undivided interest in common areas must be unanimously approved by all owners:

> [A]n amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require **1227 the unanimous written consent of all apartment owners.[FN8]

FN8. Clerk's Papers at 240.

The principal question here is whether building the bonus room converted common area into private apartment area or created new common area. If so, it changed each owner's percentage of undivided interest in the common areas without the necessary consent.[FN9]

FN9. Clausing contends the association bylaws govern, and under the bylaws, the board has authority to manage the property and must approve any structural modification to apartments or common areas. But the bylaws do not address the issue presented here-an addition that alters the character of the property-and the declaration controls.

¶ 10 The Woodcreek declaration defines apartments, common areas, and limited common areas. Apartments are the area bounded by the interior surfaces of the walls. Common areas include, in addition to those defined in RCW *362 64.32.010: [FN10] *"[A]ll areas not expressly described as part of the individual residence apartments or as limited common area"*[FN11] as well as "roofs, walls, foundations, studding, joists, beams, supports, main walls, ... pipes, conduits and wire, ... and all other structural parts of the buildings to the interior surfaces of the apartments' perimeter walls, floors, ceilings, windows and doors[,] ... [t]he green belt areas, other yard areas, all garden areas .... [and][a]ll other parts of the property necessary or convenient to its existence, maintenance, safety and use not otherwise classified." [FN12] Limited common areas, assigned to each unit, include a patio/garden, attic storage, a crawl space, an entrance area, and a driveway parking area.

FN10. RCW 64.32.010 provides: " 'Common areas and facilities', unless otherwise provided in the declaration as duly recorded or as it may be lawfully amended, includes: (a) The land on which the building is located; (b) The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobb[ie]s, stairs, stairways, fire escapes, and entrances and exits of the building; (c) The basements, yards, gardens, parking areas and storage spaces; (d) The premises for the lodging of janitors or persons in charge of the property; (e) The installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerating; (f) The elevators, tanks, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use; (g) Such community and commercial facilities as may be provided for in the declaration as duly recorded or as it may be lawfully amended; (h) All other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use."

FN11. Clerk's Papers at 282 (emphasis added).

FN12. *Id.*

[4][5] ¶ 11 Air space above an apartment unit is not part of the apartment and is not limited common area. It is a part of the property necessary to its existence and is not otherwise classified. Air space is therefore common area. By eliminating the air space above his garage, Clausing converted common area to apartment area and thus put common area to his sole benefit.

¶ 12 A somewhat similar situation arose in *Bogomolov v. Lake Villas Condominium Association of Apartment Owners.*[FN13] There, 60 percent of owners approved an amendment to Lake Villas' declaration allowing for construction of a new ***363** boat dock with slips to be leased to individual apartment owners. Because the dock was to be constructed on common area shore lands, renting slips to individual owners would convert common area into limited common area.[FN14] As some individuals would gain exclusive use of what were previously common areas, the conversion would necessarily change the value of individual owners' percentage interest in the common areas. Consequently, the court held that approval of 100 percent of the owners was required to authorize the change;

FN13. 131 Wash.App. 353, 127 P.3d 762 (2006).

FN14. *Id.* at 363, 127 P.3d 762.

[I]t is the fact that newly constructed common areas proposed here are in reality being converted to limited common areas under the proposal that requires the values stated in the Declaration to be changed. Values set forth in the Declaration are to accurately reflect the unit and limited common area interests of the owners. That change requires unanimous consent of the owners. [FN15]

FN15. *Id.* at 367, 127 P.3d 762.

**1228 The result is the same here.[FN16] Clausing gained individual use of what was previously common area. As a result, the common area interests, and thus unit values, were altered. Woodcreek's declaration requires unanimous agreement of all owners for this type of change.

FN16. Woodcreek contends the result in *Bogomolov* derived from unique aspects of the declaration, which expressly tied dock space to percentage interest, provided for transfer of such spaces among owners, and required unanimous consent for combining or subdividing like areas. We fail to see how these aspects of the declaration led to the holding cited above.

[6] ¶ 13 Clausing and Woodcreek argue that common area interests did not change because unit value determines percentage interest in common areas, and the developer did not tie unit values to bonus rooms. It may be true that the developer's declared values did not reflect a consistent difference based on the presence or absence of a bonus room, but what the developer considered in declaring the unit values and ownership percentages is irrelevant. Once the declaration is final, the values and percentages are *364 fixed. They are subject to change only by unanimous vote, and converting common area to apartment area necessarily changes them. Clausing also argues that the board approved bonus rooms without challenge seven times previously, but erroneous past practice does not enlarge the board's authority.

[7] ¶ 14 Clausing and Woodcreek next contend the bonus room was properly authorized under section 12 of the declaration, which requires approval of only 51 percent of owners to combine and subdivide apartment units. But section 12 permits combining or subdividing areas of like quality, such as apartments and apartments.[FN17] Such combinations and subdivisions do not change the total ownership interests in the property, they merely realign them. Section 12 does not authorize combining areas of different ownership quality, such as common areas and apartments.

FN17. "[N]o subdivision or combination of any apartment unit or units or of the common areas or facilities or limited common areas or facilities may be accomplished except by authorization by the affirmative vote of 51% of the voting power of the owners." Clerk's Papers at 232.

¶ 15 Clausing and Woodcreek contend that such a combination of unlike areas was permitted in *McLendon v. Snowblaze Recreational Club Owners Association.*[FN18] There, a condominium association board leased a common storage area to the owner of an adjacent unit, who planned to convert the area into a bedroom. The declaration required 60 percent of the owners in the building to approve the "subdivision o[r] combination or both, of any apartment or apartments or of the common areas, or any parts ther[e]of, and the means for accomplishing such subdivision or combination or both."[FN19] McLendon argued that the declaration required unanimous approval to combine an apartment with common area. Division III of this court rejected his argument on the ground that

the unanimous approval section "control[led] amendment of the entire declaration. It [did] *365 not address the question before us: voting requirements for combining a common area and an apartment." [FN20]

FN18. 84 Wash.App. 629, 929 P.2d 1140 (1997).

FN19. *Id.* at 632, 929 P.2d 1140.

FN20. *Id.* at 633, 929 P.2d 1140.

¶ 16 The court's opinion does not quote the portion of the declaration relied upon by McLendon. But if it is similar to the Woodcreek declaration requiring unanimous approval for changes to the value of the units or the owners' undivided interest in the common areas, we must disagree with the *McLendon* court. The declaration provision permitting combinations and subdivisions and its governing authority, RCW 64.32.090(10),[FN21] allow for subdividing apartments, combining apartments with apartments,**1229 or combining common areas with other common areas, all of which cause no net difference in the total for each type of area. Combining common area with an apartment, however, increases the private area of the apartment and reduces the total common area in which all owners have an interest.[FN22] Approval of such a combination is not within the authority conferred by the statute or section 12.

FN21. "The declaration shall contain ... [a] provision authorizing and establishing procedures for the subdividing and/or combining of any apartment or apartments, common areas and facilities or limited common areas and facilities, which procedures may provide for the accomplishment thereof through means of a metes and bounds description." RCW 64.32.090(10).

FN22. RCW 64.32.040 ("Each apartment owner shall have the common right to a share, with other apartment owners, in the common areas and facilities."); 8-54A POWELL ON REAL PROPERTY, § 54A.01 (2005) (unit owners possess nonexclusive right to use and enjoy common areas subject to community rules and regulations).

¶ 17 Constructing a bonus room also creates new common area (walls and roof, for example) and thus increases the common expenses. RCW 64.32.080 provides that "[t]he common profits of the property shall be distributed among, and the common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest in the common areas and facilities." *Keller v. Sixty-01 Associates* makes clear that the relationship between percentage of undivided interest and common expenses is such that "one could not *366 be changed without the other." [FN23] The allocation of common expenses thus cannot be altered without changing owners' percentages of undivided interest.

FN23. 127 Wash.App. 614, 623, 112 P.3d 544 (2005).

¶ 18 To cover the new expenses, the board increased Clausing's dues. Woodcreek contends the holding in

Keller invalidates Clausing's dues increase, not the authorization to build.[FN24]We disagree. An increase in common expenses owing to construction of a new private area reflects a change in the undivided interests in the property, however it is allocated. Under the declaration, unanimous approval was required.

FN24. Clausing does not address *Keller.*

¶ 19 By approving Clausing's bonus room without obtaining the unanimous consent of all owners, the board acted outside its authority.[FN25]

FN25. Given our conclusion that the board acted outside its authority, we decline to address Lake's contention that the trial court abused its discretion by allowing Woodcreek to amend its answer.

¶ 20 Alternatively, Clausing notes that we may affirm on any proper ground, whether or not considered by the trial court, and contends summary judgment was justified by laches, estoppel or waiver.[FN26] His arguments here and below address only laches, and we confine our consideration to that issue.[FN27]

FN26. The summary judgment order is silent as to the court's rationale, but a review of the oral ruling makes clear the court did not rely upon equitable grounds.

FN27. RAP 10.3(a)(5) (failure to provide argument or authority in support of an assignment of error precludes review).

[8][9] ¶ 21 Laches is an "implied waiver arising from knowledge of existing conditions and acquiescence in them."[FN28] To establish laches, the defendant must show the plaintiff (1) knew or reasonably should have known the facts constituting the cause of action, (2) unreasonably delayed commencing the action, and (3) caused resulting ***367** damage to the defendant.[FN29] It is the defendant's burden to show whether and to what extent he or she has been prejudiced.[FN30] Clausing does not specify the damage resulting from Lake's delay, but implies it was the expense of construction.[FN31]

FN28. *Buell v. Bremerton,* 80 Wash.2d 518, 522, 495 P.2d 1358 (1972).

FN29. *In re Marriage of Watkins,* 42 Wash.App. 371, 374, 710 P.2d 819 (1985).

FN30. *Clark County Pub. Util. Dist. No. 1 v. Wilkinson,* 139 Wash.2d 840, 849, 991 P.2d 1161 (2000).

FN31. *See* Clerk's Papers at 193 ("The cost of my bonus room remodeling was in excess of $150,000.... I would not have built the bonus room had the Board not given me permission to do so.").

[10][11] ¶ 22 Lake did not become aware of the project until she received a letter dated July 10, 2004, in which Clausing gave notice to his neighbors that he was beginning ****1230** construction of a bonus room in two days.[FN32] It was thus a practical impossibility for Lake to obtain an

injunction before Clausing had made significant expenditures. The question, then, is the reasonableness and consequences of Lake's failure to seek court intervention before construction was complete some seven weeks later.[FN33] A reasonable delay in filing suit is not fatal to an action for specific performance of a building restriction where the delay results from a desire to procure compliance by means other than litigation.[FN34] Where notice came so late, compliance was sought by other means, and construction proceeded apace, we cannot say as a matter of law that Lake's failure to seek a restraining order during this brief period was unreasonable. We decline to affirm summary judgment against Lake on this ground.

> FN32. The board approved the bonus room at its May 20, 2004 meeting. According to Lake, she may have received a copy of the minutes of the May meeting after they were approved at the next meeting on June 17, but if so, she did not read them because she was caring for parents in their nineties. (Her father died June 8, and her mother is in nursing care).
>
> FN33. Although Clausing emphasizes that Lake waited 15 months to file suit, he alleges no prejudice from post-construction delay.
>
> FN34. *Mt. Baker Park Club v. Colcock, Inc.*, 45 Wash.2d 467, 472, 275 P.2d 733 (1954).

¶ 23 We reverse summary judgment in favor of Clausing and Woodcreek, reverse the award of fees and costs against ***368** Lake, and remand for further proceedings consistent with this opinion.

WE CONCUR: COLEMAN, C.J., and APPELWICK, J.APPELWICK, C.J. (Concurring).

¶ 24 I fully concur with the majority opinion. I write to emphasize additional reasoning for the result.

¶ 25 First, a condominium is real property. That real property interest includes an ownership interest in, right to share in, and an easement to use the common areas and facilities. RCW 64.32.030, .040, .050(4). Further, common areas shall remain undivided and any covenant to the contrary is void. RCW 64.32.050(3). According to the declaration here, the common areas include everything not an apartment or designated limited common area.

¶ 26 When construction on the units was complete, any optional bonus room shown on the plans that had not been constructed was not within an apartment. It was also not designated as limited common area. Therefore it was common area. Later enclosing this common area to add a bonus room onto an adjacent apartment is a taking of a common area interest owned by all members of the condominium. This may not be done without the consent of all owners.

¶ 27 It is precisely for this reason that *McLendon* was wrongly decided. *McLendon* allowed the combination of a common area storage shed with an apartment on less than a unanimous vote under RCW 64.32.090(10) (authorizing the declaration to provide combining or dividing apartments, common areas and limited common areas on less than unanimous vote of owners). This statute and section 12 of the declaration must be read to apply

only to combining or dividing like-kind properties. Otherwise, the other owners are deprived of a portion of their real property ownership interest in common areas without consent, let alone compensation.

***369** ¶ 28 Further, I would hold that the addition of a room at the expense of common area necessarily increases the value of that apartment and of the condominium as a whole. It also necessarily changes the ownership interests of all owners relative to one another. This in turn requires amendment to the declaration. Unanimous consent of the owners is required for amending the declaration. RCW 64.32.090(13).

¶ 29 If the additional room was built on new footings off the end of a one story building eliminating a prized common area garden and blocking the exclusive view of the sound for other owners, the facts would tug more at the emotions. But the loss of real property interests are just as real on these facts where the additional room is built on a second story of a townhouse condominium ****1231** above a garage blocking light. These real property interests cannot be taken. Consent of all of the owners is required. For these reasons and the reasons stated by the majority, I concur.

Wash.App. Div. 1,2007.
Lake v. Woodcreek Homeowners Ass'n
142 Wash.App. 356, 174 P.3d 1224

END OF DOCUMENT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

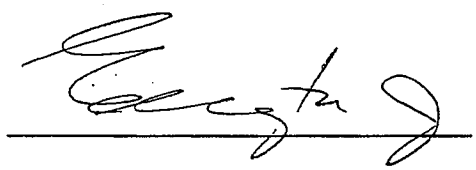
SANDRA LAKE, individually, Appellant, v. WOODCREEK HOMEOWNERS ASSOCIATION, a Washington homeowners association; GLEN R. CLAUSING, a single man, Respondents.	)	No. 59211-4-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Glen Clausing filed a motion for reconsideration of the court's opinion filed December 31, 2007. The panel has considered the motion and determined it should be denied. Now, therefore, it is hereby

ORDERED that respondent Clausing's motion for reconsideration is denied.

Dated this 22nd day of May, 2008.

FOR THE PANEL:



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McLendon v. Snowblaze Recreational Club Owners AssociationWash.App. Div. 3,1997.

Court of Appeals of Washington,Division 3, Panel One.

Richard McLENDON, A Single Man, Appellant,
v.
SNOWBLAZE RECREATIONAL CLUB OWNERS ASSOCIATION, a Washington Condominium Owners' Association; and Ruth A. Branson, A Single Woman, Respondents.

No. 14411-9-III.

Jan. 21, 1997.

Condominium unit owner sued condominium association to declare association's lease with another owner for common area invalid, and for permanent injunction. The Superior Court, Spokane County, Tari Eitzen J., granted association's motion for summary judgment. Owner appealed. The Court of Appeals, Sweeney, C.J., held that: (1) lease was properly ratified following invalidation of condominium declaration under which it was originally approved, and (2) lease did not violate statute prohibiting unit owner from bringing action for partition of common areas.

Affirmed.

West Headnotes

[1] Condominium 89A 15

89A Condominium
89Ak15 k. Transfer by Unit Owners or Associations. Most Cited Cases
Lease between condominium association and unit owner for common area that would be combined with owner's apartment was properly ratified, under terms of previously effective condominium declaration, by vote of 63.45% of owners, following invalidation of subsequent declaration under which lease was originally approved, which previous declaration required 60% affirmative vote to approve combining common area and apartment, and required unanimous vote only for amending entire declaration.

[2] Contracts 95 97(1)

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent
95k97 Estoppel and Ratification
95k97(1) k. In General. Most Cited Cases
Agreement may be made fully operative by subsequent validation.

[3] Condominium 89A 15

89A Condominium
89Ak15 k. Transfer by Unit Owners or Associations. Most Cited Cases
Lease between condominium association and unit owner for common area that would be combined with owner's apartment did not violate statute prohibiting unit owner from bringing action for partition of common areas; lease was authorized by condominium declaration which, pursuant to statutory requirements, contained provision authorizing and establishing procedures for subdividing and/or combining of apartments and common areas. West's RCWA 64.32.050(3), 64.32.090(10).

[4] Condominium 89A 11

89A Condominium
89Ak6 Common Elements; Management and Control
89Ak11 k. Improvements and

Alterations. Most Cited Cases
Apartment owner must not be allowed to bring any action for partition of common areas as long as condominium continues.

****1140 *630** Dustin D. Deissner, Spokane, for Appellant.
Brad E. Herr, Patrick J. Downey, Spokane, James B. King, Christopher J. Kerley, Keefe, King & Bowman, Spokane, for Respondents.
***631** SWEENEY, Chief Judge.
In 1987, the owners of the Snowblaze condominium units formed an organization now called the Snowblaze Recreational Club, Inc., to govern the affairs of the Snowblaze condominiums (the 1987 Declaration). Management is by a board of directors. The 1987 Declaration authorizes the subdivision and combination of apartments, common areas and facilities by a 60 percent vote of all apartment owners.

In 1990, Snowblaze owners adopted a new declaration (the 1990 Declaration). In 1991, the Board of Directors agreed to lease Ruth Branson a common storage area next to her unit. She planned to convert the storage area into a bedroom for her unit. The 1990 Declaration required approval of 67 percent of the owners in the *involved building only* to combine an apartment and a common area. Fourteen of the fifteen owners in her building approved.

Later, in an unrelated lawsuit, a Spokane County Superior Court ruled the 1990 Declaration invalid. In 1993, the Board submitted ****1141** a new declaration to all owners for approval. In the same election it asked the owners to ratify its actions during the period between the ineffective 1990 Declaration and the new declaration. Of the total membership, 67 percent approved the new declaration and 63.45 percent ratified the Board's actions.

Richard McLendon, a condominium owner, sued Ms. Branson and Snowblaze to declare the lease invalid and for a permanent injunction. Snowblaze and Ms. Branson answered, alleging among other things, that Snowblaze had authority to enter into the lease under the 1987 Declaration and the 1993 ratification. Mr. McLendon and Snowblaze moved for summary judgment. The court granted Snowblaze's motion for summary judgment. Mr. McLendon appeals.

The case presents two questions: (1) Did the owners properly ratify the Board's decision to lease the common area to Ms. Branson under the 1987 Declaration, and (2) ***632** does the lease violate the prohibitions of RCW 64.32.050(3) which bars partitioning of common areas.

DISCUSSION

The material facts are undisputed; we decide whether the moving party is entitled to judgment as a matter of law. *Marincovich v. Tarabochia,* 114 Wash.2d 271, 274, 787 P.2d 562 (1990).

[1] ***Whether Snowblaze Properly Ratified the Lease.*** Mr. McLendon first contends the owners did not properly ratify the Branson lease. He claims that the 1987 Declaration required the unanimous consent of all owners in Snowblaze to combine a common area and an apartment.

When the 1990 Declaration was declared invalid, the 1987 Declaration became the governing declaration. *See Rains v. Walby,*

13 Wash.App. 712, 720, 537 P.2d 833 (1975) (finding that when agreement that was to supplement the prior agreement failed for lack of consideration, the prior agreement remained in force), *review denied,* 86 Wash.2d 1009 (1976). To comply with the 1987 Declaration, more than 60 percent of the apartment owners had to ratify the lease of the common area. "[A]partment owners having sixty percent (60%) of the votes may provide for the subdivision of [sic] combination or both, of any apartment or apartments or of the common areas, or any parts therof [sic], and the means for accomplishing such subdivision or combination, or both...." Section 16.01 of the 1987 Declaration.

[2] The owners ratified all Board action between the invalid 1990 Declaration and adoption of the 1993 Declaration, with a 63.45 percent affirmative vote. The vote ratified the Branson lease. An agreement may be made fully operative by subsequent validation. *See* 1 Arthur L. Corbin, *Corbin on Contracts* § 1.6, at 19 (Joseph M. Perillo rev. ed. 1993); *see also* Restatement (Second) of Contracts § 380 cmt. a (1979).

Mr. McLendon argues that section 30 of the 1987 Declaration***633** requires unanimous approval to combine the apartment and common area. He is mistaken. That provision, or at least the portions addressed by the parties here, controls amendment of the entire declaration. It does not address the question before us: voting requirements for combining a common area and an apartment.

[3] ***Whether the Lease Is Void as Contrary to RCW 64.32.*** Mr. McLendon next contends that the contract created under section 16.01 of the 1987 Declaration violates RCW 64.32.050(3) and is therefore void.

RCW 64.32.050(3) provides that "[t]he common areas and facilities shall remain undivided and no apartment owner ... shall bring any action for partition or division of any part thereof...." But RCW 64.32.090(10) requires that a condominium declaration contain "[a] provision authorizing and establishing procedures for the subdividing and/or combining of any apartment or apartments, common areas and facilities or limited common areas and facilities...." Section 16.01 of the 1987 Declaration then is the provision required by RCW 64.32.090(10).

[4] Both statutes are easily reconciled. RCW 64.32.050(3) addresses problems created by the nature of condominiums as a tenancy in common. The right to partition is an established characteristic of tenancies in common. 4B Richard R. Powell & Patrick J. ****1142** Rohan, *Powell on Real Property* ¶ 633.11 [1], at 806 (1990). But to allow a unit owner to bring an action to partition common areas would disrupt the whole condominium structure. Powell & Rohan, at 806. RCW 64.32.050(3) addresses that threat. An apartment owner must not be allowed to bring any action for partition as long as the condominium continues. Powell & Rohan, ¶ 633.11[4], at 809. The 1987 Declaration, by section 16.01, establishes procedures required by RCW 64.32.090(10). The contract created under that section is not inconsistent with RCW 64.32.050(3).

Affirmed.

***634** THOMPSON, J. and RAY E. MUNSON, J. Pro Tem., concur.
Wash.App. Div. 3,1997.
McLendon v. Snowblaze Recreational Club Owners Association

84 Wash.App. 629, 929 P.2d 1140

END OF DOCUMENT

RCW 64.32.050
Common areas and facilities.

(1) Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration. Such percentage shall be computed by taking as a basis the value of the apartment in relation to the value of the property.

(2) The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall not be altered except in accordance with procedures set forth in the bylaws and by amending the declaration. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains even though such interest is not expressly mentioned or described in the conveyance or other instrument. Nothing in this section or this chapter shall be construed to detract from or limit the powers and duties of any assessing or taxing unit or official which is otherwise granted or imposed by law, rule, or regulation.

(3) The common areas and facilities shall remain undivided and no apartment owner or any other person shall bring any action for partition or division of any part thereof, unless the property has been removed from the provisions of this chapter as provided in RCW 64.32.150 and 64.32.230. Any covenant to the contrary shall be void. Nothing in this chapter shall be construed as a limitation on the right of partition by joint owners or owners in common of one or more apartments as to the ownership of such apartment or apartments.

(4) Each apartment owner shall have a nonexclusive easement for, and may use the common areas and facilities in accordance with the purpose for which they were intended without hindering or encroaching upon the lawful right of the other apartment owners.

(5) The necessary work of maintenance, repair and replacement of the common areas and facilities and the making of any addition or improvement thereto shall be carried out only as provided in this chapter and in the bylaws.

(6) The association of apartment owners shall have the irrevocable right, to be exercised by the manager or board of directors, to have access to each apartment from time to time during reasonable hours as may be necessary for the maintenance, repair, or replacement of any of the common areas and facilities therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another apartment or apartments.

[1965 ex.s. c 11 § 2; 1963 c 156 § 5.]

RCW 64.32.090
Contents of declaration.

The declaration shall contain the following:

(1) A description of the land on which the building and improvement are or are to be located;

(2) A description of the building, stating the number of stories and basements, the number of apartments and the principal materials of which it is or is to be constructed;

(3) The apartment number of each apartment, and a statement of its location, approximate area, number of rooms, and immediate common area to which it has access, and any other data necessary for its proper identification;

(4) A description of the common areas and facilities;

(5) A description of the limited common areas and facilities, if any, stating to which apartments their use is reserved;

(6) The value of the property and of each apartment, and the percentage of undivided interest in the common areas and facilities appertaining to each apartment and its owner for all purposes, including voting;

(7) A statement of the purposes for which the building and each of the apartments are intended and restricted as to use;

(8) The name of a person to receive service of process in the cases provided for in this chapter, together with a residence or place of business of such person which shall be within the county in which the building is located;

(9) A provision as to the percentage of votes by the apartment owners which shall be determinative of whether to rebuild, repair, restore, or sell the property in event of damage or destruction of all or part of the property;

(10) A provision authorizing and establishing procedures for the

subdividing and/or combining of any apartment or apartments, common areas and facilities or limited common areas and facilities, which procedures may provide for the accomplishment thereof through means of a metes and bounds description;

(11) A provision requiring the adoption of bylaws for the administration of the property or for other purposes not inconsistent with this chapter, which may include whether administration of the property shall be by a board of directors elected from among the apartment owners, by a manager, or managing agent, or otherwise, and the procedures for the adoption thereof and amendments thereto;

(12) Any further details in connection with the property which the person executing the declaration may deem desirable to set forth consistent with this chapter; and

(13) The method by which the declaration may be amended, consistent with this chapter: PROVIDED, That not less than sixty percent of the apartment owners shall consent to any amendment except that any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous consent of the apartment owners.

[1963 c 156 § 9.]

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Seattle Area Condominium Market Subdued

BY TIM FAHEY
Property Dynamics

When they're hot, they're hot and when they're not, they're not.

That axiom best describes the history of condominiums in the Puget Sound region. Since the Horizontal Regimes Property Act was enacted by the Washington State Legislature in 1963 (Condominium Law) and revised and rewritten, there have been about 69,000 units recorded as condominiums in the five county Puget Sound Region. Seventy seven percent or about 53,500 have been recorded in King County, with the remaining 23 percent distributed between Snohomish, Pierce, Thurston and Kitsap Counties.

Nearly half of the condos were recorded during the five year period from 1979 through 1983. Be cautious when calculating the number of "unsold" condominiums in the region. Many of the units which fall into the category are actually apartments which were converted to condominiums, and because of a lack of sales, were ultimately reconverted back to apartment rentals.

Conversions:

Eighty percent of the condo conversions occurred during the period from 1977-1980. That was a phenomena which was brought about by an extreme housing shortage during a period when an average of 200 people per day were moving into King County. Under normal conditions, that many people would be creating a demand for an additional eighty housing units per day.

Apartment owners, capitalizing on the extreme housing shortage, converted their rentals into condominiums. In turn, that created a tight rental market with vacancies hovering between 0.5 percent and 1 percent, causing rents to escalate, which encouraged public pressure to have cities and counties enact conversion ordinances to protect apartment residents.

Several jurisdictions did enact those laws, which ultimately put the brakes on conversions. However, by the time most governmental bodies acted, the proverbial cat was out of the bag.

When conversions were hot, it was not uncommon for apartment buildings with more than 200 units to be converted. As a matter of fact, at one time in 1979, we had 10 such developments with more than 200 units, including one with 750. Over the past year, in the five county area, we have had a total of 19 buildings being converted containing about 600 units for an average size of 31 units.

The present activity in condominiums conversions is relatively subdued for the following reasons:

1. During the late 1980s and through mid-1995, owners and developers, in an attempt to overcome objections of earlier conversions, constructed their apartments to "condominium" standards, that is units with about 10 to 15 percent more square footage, better sound control, garages or covered parking, upgraded appliances and better design.

   Conversions today, for the most part, do not make economic sense. Apartment building owners simply want too much money per unit, to make the conversions work. When the professional converter adds in the upgrading costs, the legal and engineering fees, the selling, closing and marketing costs, there is typically no room for profit and risk.

2. Another recent fear has been lawsuits. When converting an older building, sophisticated converters can see the potential of things going wrong in older developments.

Although some of the projects which have filed a recording declaration have been taken off the condominium rolls over the years, here are the estimates as of Jan. 1, for the four county condo market.

- King County, 53,500 units, 73.36 percent;
- Snohomish County, 9,100 units, 13.16 percent;
- Pierce County, 4,580 units, 6.62 percent;
- Kitsap County, 1,980 units, 2.86 percent.

In King County, about 20 percent of units recorded are located in Redmond. Another 20 percent of the units recorded are in the city of Seattle, including Capitol Hill, Downtown, Madison Park, Queen Anne, University, Sand Point and Green Lake. About 37 percent of the units have been built or converted east of Lake Washington from north Renton to Woodinville, while 38 percent are located within the city of Seattle and north King County. The remaining 25 percent were distributed throughout all of south King County.

In Pierce County, about half of the recordings were in south Tacoma and about one sixth were in the Gig Harbor and in extreme north Tacoma.

In Snohomish County, about 70 percent of the activity has occurred in the southern part of the county in the cities of Edmonds, Mountlake Terrace, Lynnwood, Mill Creek and South Everett.

Kitsap County has had the most activity in the Bremerton and Bainbridge Island region.

To demonstrate the cyclical nature of condominiums in this region, it should be pointed out that for the first 10 years, there were only 1,676 units recorded; in the next five years (1974 - 1978) there were 5,487; between 1979 and 1984 there were 27,199 and in the past 12 years (1985-1995) there were 17,992.

From the recession period of 1982 through 1988 the condominium market became ice cold. Eight high rise condominiums in downtown Seattle and in the First Hill area were the victims of overbuilding and a recessionary period, and were either converted to rentals, returned to the lender or sold at an auction or sheriffs' sale. More than 500 units priced at over $200,000 were unsold. It was 1988 before the market turned back and the units were reconverted to condominiums and sold out in two years averaging about a 35 percent discount from the original asking price.

In mid-1990, the market became very difficult and 1991 represented

the slowest building permit year we had in a decade. After about two years of difficulty with sales, the market began to perk up, and since about the autumn of 1992 closing have shown renewed strength.

Most of the new activity since 1992 has occurred in North King County and East of Lake Washington. In 1994, South King, South Snohomish, Pierce, Kitsap and Thurston Counties, which had been dormant for 10 years, sprung to life.

One of the changes in the 1990s has been the size of projects. While 15 years ago, the average size of a development ranged between 40 and 200 units, it is rare to find new projects with more than 30-40 units. The average of all projects in January was 39. Larger proposals are almost always phased.

More projects were recorded during 1994 and 1995 than at anytime since 1979. The number of units were noticeably less since the average size of projects have been greatly reduced.

Several traditional single family housing developers in the region are converting their efforts to condominiums, as the average sales price of all single family housing hovers around $162,000. As houses continue to escalate out of the affordable price range, look for moderately priced condominiums to take their place in the market as starter homes. In 1995, 62 percent of the multi-family units permitted in the Puget Sound area were condominiums, with 38 percent being either rentals or senior congregate care or assisted living.

There are some recent trends which are worth noting.

35 percent of the closing during 1994 and 1995 were to single females. That was an increase from about 20 percent in 1980.

As of January of 1996, there are more than 200 condominiums priced at $400,000 or more in the market area that are in planning, under construction, or actively selling. There is no guarantee that all of those which are in planning will proceed, but if they do, based on historical closing, we have enough of that product to last until 2010. We have about a two-year supply of every other category. It is extremely difficult to convey to developers that an extremely small

percentage of households in the area can qualify for and want a $400,000 condominium.

Condominium sales in the moderate prices ranges from $80,000 to $150,000 will sell well in 1996, with about 3,500 closings for all price ranges in both resales and first time sales. At this time most of the economic indicators are pointing towards a better 1997.

Tim Fahey is co-founder and director of research for Property Dynamics, a Kirkland-based company that does market and feasibility studies for real estate development.


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